Sabah Bank Bhd (now known as Alliance Bank Malaysia Bhd) v Master Perkasa (M) Sdn Bhd & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO S-02–881 OF 2009
TENGKU BAHARUDIN SHAH, MOHD HISHAMUDIN AND AZHAR MA'AH JJCA
23 JANUARY 2011

Evidence — Documentary evidence — Sufficiency of evidence — Failure of judge to consider contemporaneous documentary evidence — Banking facilities granted to customer restructured by variation letter — Whether trial judge was correct to decide case based on variation letter alone — Whether factual background contemporaneous documents and letters between parties ought to have been considered

By a banking facility agreement ('BFA'), the appellant granted the first respondent a bridging loan and a bank guarantee facility ('the facilities'). To secure the facilities, the second respondent executed two personal guarantees favouring the appellant. The BFA was to finance the first respondent's development on two pieces of land it had bought from a company, JCSB. To secure payment of the purchase price for the lands, the appellant, at the first respondent's request, had issued a bank guarantee ('the guarantee') for RM2m favouring JCSB. The first respondent failed to settle the purchase price and JCSB called on the guarantee. The parties agreed for RM1.5m of the guarantee amount to be released to JCSB and the balance to be kept in a fixed deposit account for a two years period or until final order of the High Court. After the sum was released to JCSB, the appellant demanded the first respondent pay to it the released sum with interest. The first respondent failed to pay and asked for more time but the appellant refused, recalled and terminated the facilities and demanded that the amount paid under the guarantee be settled within two weeks. In response to the first respondent's appeal for indulgence and new terms of settlement, the appellant allowed the guarantee to be converted into a fixed loan payable over 60 equal monthly instalments from April 1999 and for interest to be serviced monthly in the meanwhile and for all other terms and conditions to remain unchanged. On further appeal by the first respondent, the appellant finally agreed, by letter dated 2 July 1998 ('the variation letter') to reduce the interest further and allowed repayment to begin from April 2001. Despite these indulgences, the first respondent still failed to service the interest on the loan. After several of its demands went unheeded, the appellant filed action in court for recovery. The respondents counterclaimed for loss suffered as a result of the withdrawal and termination of the bridging loan. The High Court dismissed the appellant's action and allowed the first respondent's

counterclaim. In its appeal against the decision to the Court of Appeal, the appellant said the trial judge erred in making a decision by considering the appellant's variation letter in isolation, ignoring the terms and conditions found in other contemporaneous documents in the transaction such as the offer letter, the BFA, various correspondence between the parties and the factual background and circumstances that led to the issuance of the variation letter. It was submitted the variation letter was the culmination of a series of bargains and negotiations by the first respondent with the appellant.

Held, allowing the appeal with costs:

(1) The variation letter was not a stand alone agreement. It had to be read together with other documents preceding it to determine and ascertain the intention of the parties. A significant clause in the letter stated that all other terms and conditions stipulated in the appellant's earlier letters shall remain unchanged (see para 24).

(2) The terms and conditions found in the variation letter read together with the BFA and subsequent correspondence between the parties clearly showed the appellant had only agreed at the first respondent's request to convert the guarantee into a fixed loan payable within 60 months starting April 2001. The appellant in the same clause clearly impressed upon the first respondent to service the interest monthly in the meanwhile. These varied terms and conditions were unconditionally accepted by the first respondent (see para 26).

(3) On the first respondent's failure to service the monthly interest, the appellant was entitled to terminate and recall the RM2m loan (see paras 27, 13(iv) & (v)).

(4) The second respondent was liable for the first respondent's debt as the variation letter did not in any way affect the rights and liabilities of the parties under the guarantee (see para 28).

(5) The bridging loan was not unlawfully terminated. The first respondent failed to meet its obligations under the BFA despite the restructuring of facilities and being given time to settle. The appellant had every good reason for not wanting to proceed with the agreement and terminating the bridging loan (see para 29).

(6) If at all there was any loss suffered by the first respondent, the appellant was not to be blamed (see para 30).

[Bahasa Malaysia summary

Melalui perjanjian kemudahan perbankan ('PKP'), perayu telah memberikan responden pertama pinjaman penyambung dan kemudahan gerenti bank ('kemudahan tersebut'). Bagi menjamin kemudahan tersebut, responden kedua telah memasuki dua gerenti peribadi bagi pihak perayu. PKP adalah

untuk membiayai pembangunan dua keping tanah responden pertama yang dibelinya daripada syarikat, JCSB. Bagi menjamin bayaran harga belian tanah tersebut, perayu, atas permintaan responden pertama, telah mengeluarkan gerenti bank ('gerenti tersebut') sebanyak RM2 juta bagi pihak JCSB. Responden pertama telah gagal menyelesaikan harga belian dan JCB telah meminta gerenti tersebut dikemukakan. Pihak-pihak bersetuju agar RM1.5 juta daripada jumlah gerenti tersebut diberikan kepada JCSB dan baki disimpan dalam akaun deposit tetap bagi tempoh dua tahun atau sehingga perintah muktamad Mahkamah Tinggi. Selepas jumlah itu diberikan kepada JCSB, perayu telah menuntut agar responden pertama membayar kepadanya jumlah yang diberikan dengan faedah. Responden pertama telah gagal membayar dan meminta masa lebih tetapi perayu enggan, meminta balik dan menamatkan kemudahan tersebut dan menuntut agar jumlah yang dibayar di bawah gerenti tersebut diselesaikan dalam tempoh dua minggu. Sebagai jawapan kepada rayuan responden pertama untuk kelonggaran dan syarat penyelesaian baru, perayu telah membenarkan gerenti tersebut ditukar kepada pinjaman tetap yang perlu dibayar dalam jumah sama secara 60 ansuran bulanan dari bulan April 1999 dan agar faedah dikenakan setiap bulan pada masa ini dan agar semua terma dan syarat lain tidak ditukar. Atas rayuan selanjutnya oleh responden pertama, perayu akhirnya bersetuju, melalui surat bertarikh 2 Julai 1998 ('surat pengubahan') untuk mengurangkan faedah selanjutnya dan membenarkan bayaran balik bermula dari bulan April 2001. Meskipun terdapat kelonggaran tersebut, responden pertama masih gagal membayar faedah ke atas pinjaman. Selepas beberapa tuntutannya tidak diendahkan, perayu telah memfailkan tindakan di mahkamah untuk mendapatkan balik wangnya. Responden-responden menuntut balas untuk kerugian yang dialaminya akibat penarikan balik dan penamatan pinjaman penyambung itu. Mahkamah Tinggi telah menolak tindakan perayu dan membenarkan tuntutan balas responden pertama. Dalam rayuannya terhadap keputusan tersebut ke Mahkamah Rayuan, perayu menyatakan hakim perbicaraan terkhilaf dalam membuat keputusan dengan mengambilkira surat perubahan perayu secara berasingan, dan tidak menghiraukan terma dan syarat yang didapati dalam dokumen semasa yang lain dalam transaksi seperti surat tawaran, PKP tersebut, pelbagai surat menyurat antara pihak-pihak dan fakta latar belakang dan keadaan yang membawa kepada pengeluaran surat perubahan itu. Adalah dihujahkan surat perubahan itu adalah hasil siri tawaran dan rundingan oleh responden pertama dan perayu.

Diputuskan, membenarkan rayuan dengan kos:

(1) Surat perubahan bukan perjanjian yang berdiri sendiri. Ia perlu dibaca bersama dokumen lain sebelumnya untuk menentukan dan memastikan niat pihak-pihak. Fasal penting dalam surat itu menyatakan bahawa semua terma dan syarat lain yang ditetapkan dalam surat-surat terdahulu perayu hendaklah kekal tidak diubah (lihat perenggan 24).

(2) Terma dan syarat yang didapati dalam surat perubahan dibaca bersama PKP dan surat-menyurat berikutan itu antara pihak-pihak jelas menunjukkan perayu hanya bersetuju atas permintaan responden pertama untuk mengubah gerenti tersebut kepada pinjaman tetap yang perlu dibayar dalam tempoh 60 bulan bermula dari bulan April 2001. Perayu dalam fasal sama jelas menekankan ke atas responden pertama untk membayar faedah bulanan buat masa tersebut. Terma dan syarat yang diubah itu telah diterima tanpa syarat oleh responden pertama (lihat perenggan 26).

(3) Berhubung kegagalan responden pertama untuk membayar faedah bulanan itu, perayu berhak menamatkan dan mendapat balik pinjaman RM2 juta itu (lihat perenggan 27, 13(iv) & (v)).

(4) Responden kedua bertanggungjawab untuk hutang responden pertama kerana surat perubahan itu tidak dalam apa cara menjejaskan hak dan liabiliti pihak-pihak di bawah gerenti tersebut (lihat perenggan 28).

(5) Pinjaman perubahan telah ditamatkan secara tidak sah. Responden pertama telah gagal memenuhi tanggungjawabnya di bawah PKP meskipun kemudahan distruktur semula dan masa penyelesaian telah diberikan. Perayu mempunyai alasan baik untuk tidak ingin meneruskan perjanjian tersebut dan menamatkan pinjaman penyambung tersebut (lihat perenggan 29).

(6) Jikapun terdapat apa-apa kerugian yang dialami oleh responden pertama, perayu tidak boleh dipersalahkan (lihat perenggan 30).]

Notes

For a case on sufficiency of evidence, see 7(1) *Mallal's Digest* (4th Ed, 2011 Reissue) para 1499.

Cases referred to

Glamour Green Sdn Bhd v Ambank Bhd & Ors & Another Appeal [2007] 3 CLJ 413, CA (refd)

Alex Decena (Lau Cheung Hoon with him) (Jaysuria Kah & Co) for the appellant.
Lim Pitt Kong (PK Lim & Co) for the respondents.

Azhar Ma'ah JCA (delivering judgment of the court):

[1] The facts not in dispute were that by a banking facility agreement dated 12 May 1997 entered into between the appellant and the first respondent, the appellant granted to the first respondent banking facilities made up of a bridging loan facility of RM18.5m and a bank guarantee facility of RM5m. As

security and in consideration of the appellant granting the banking facilities, the second respondent executed two personal guarantees in favour of the appellant.

[2] The purpose of the facility was to finance the first respondent's development project on two parcels of land held under country lease 015006194 and country lease 015011319 which the first respondent had purchased from Jelas Cemerlang Sdn Bhd ('JCSB'). As security of JCSB for the purchase price of the said lands, the first respondent requested the appellant to issue the bank guarantee for RM2m in favour of JCSB. The bank guarantee was issued on 24 November 1997. Following the first respondent's failure to meet its obligation to pay the purchase price for the lands, JCSB demanded for payment from the appellant under the bank guarantee. A letter of demand dated 13 December 1997 was sent by JCSB to the appellant demanding the appellant to release the RM2m to them. The appellant, however, did not accede to the said demand for the reason that by a letter dated 24 December 1997 the appellant was informed by the first respondent's solicitors that an application for injunction had been filed at Kota Kinabalu High Court on behalf of the first respondent to restrain the appellant from releasing the money to JCSB. Pending hearing of the application the appellant was asked to hold on to the money.

[3] Subsequently, the appellant received a letter from Messrs Lee & Thong, solicitors for JCSB dated 20 January 1998 informing the appellant that by a consent judgment the first respondent had withdraw its injunction application and a consent order was filed into court by the first respondent's solicitors. By the same letter the appellant was informed that by the said consent order parties agreed that the sum of RM1.5m be allowed to be called and released to JCSB whilst the balance of RM500,000 would be placed into the appellant's bank under a fixed deposit account in the name of the deputy registrar of the High Court for a period of two years or until final order of the High Court. By that same letter, too, the solicitors on behalf of JCSB renewed their demand and requested the appellant to release the RM1.5m to them. The appellant responded positively by releasing the said sum to JCSB. The respondent was informed of this vide a letter from the bank dated 21 January 1998 wherein the appellant at the same time requested the respondent to make immediate arrangement to settle the amount called upon together with interest.

[4] As no payment was forthcoming, the appellant by its letter dated 28 February 1998 made a second demand demanding the first respondent to settle the outstanding sum within seven days from the date thereof. The first respondent then on 11 March 1998 wrote to the appellant appealing that they be given some time and the facility be maintained and not withdraw.

[5] The appellant did not accede to the first respondent's above request and instead issued a letter dated 16 March 1998 informing the first respondent that the bank was recalling and terminating the entire finance facility including the bridging loan of RM18.5m and the remaining unutilised portion of the bank guarantee of RM3m.

[6] By the same letter the appellant also demanded the first respondent to settle the RM2m within 14 days or else the bank would institute proceedings for recovery. To this notice of withdrawal and demand, the first respondent responded whereby by its letter dated 18 March 1998, the first respondent appealed for the appellant's indulgence to grant the first respondent some time to settle the RM2m and at the same time proposing some new terms ie to settle the RM2m within five years and the interest rate be reduced, with the view to lighten the first respondent's financial strain.

[7] By its letter to the first respondent dated 9 April 1998 the appellant/bank gave somewhat a favourable reply to the first respondent's appeal on the terms, inter alia, that the RM2m bank guarantee be converted into fixed loan payable by way of 60 equal monthly instalments of RM46,952.20 (inclusive of interest) commencing April 1999 until full settlement or at an earlier date to be determined at the sole discretion of the bank and meanwhile interest is to be serviced monthly. All other terms and conditions shall remain unchanged.

[8] Not quite satisfied with the abovementioned variation and new terms granted by the bank, the first respondent again on 18 May 1998 wrote to the appellant/bank seeking further indulgence on the terms and conditions of payment on the grounds that they had not launched the project and its completion would be about three years thereafter. In the circumstances, the first respondent requested for a further reduction of the interest to 1%, and the date of commencement of payment of instalments to begin from April 2001, instead of April 1999 as earlier agreed by the appellant.

[9] The appellant responded to the said request quite positively in that it agreed to reduce the interest by a further 0.5% thus making it 1.5% above BLR, and also the appellant acceded to the request that payment of instalment would begin from April 2001. This was communicated to the first respondent by the appellant's letter dated 2 July 1998.

[10] The first respondent accepted these terms by signing the said letter and at the same time expressed its appreciation to the appellant for granting their request.

[11] Notwithstanding what had transpired between them and the various indulgence granted by the appellant to the first respondent, the latter still failed

to service the interest on the RM2m loan. The appellant sent out three reminders to the first respondent. The third reminder was sent on 2 October 1998. By that time the first respondent was already nine months in arrears of their interest payment. A letter of demand was subsequently sent to the first and second respondents. As the said demand was not heeded, the appellant/bank finally filed a writ of summons. Hence, the present action whereby the appellant/bank claimed a sum of RM2,361,399.56 under the bank guarantee which included accrued interest of RM361,399.56 calculated from the date of release.

[12] The first and second respondents apart from filing their statement of defence also asserted their claim against the appellant/bank by way of counterclaim wherein they alleged to have suffered loss resulting from the withdrawal of the bridging loan by the appellant/bank.

THE DECISION OF THE HIGH COURT

[13] At the outset of the trial parties are on common ground that the issue that need to be determined by the trial judge are these:

(a) When the RM2m bank guarantee dated 24 november 1997 was converted into fixed loan:

(i) whether the repayment of the fixed loan was agreed between the plaintiff and defendant on terms, inter alia, that the repayment of the principal (of RM2m) and interest was by way of sixty (60) equal monthly instalments was to commence on April 2001 until full settlement;

(ii) whether the first defendant is required to and liable to service the monthly interest from 21 January 1998 until March 2001 at prevailing interest rate;

(iii) if the answer to issue 1.2 is in the negative, whether the plaintiff's action against the first and second defendants herein is premature;

(iv) if the answer to issue 1.2 is in the affirmative, whether the first defendant did service the said monthly interest;

(v) if the first defendant did not service the said monthly interest, whether the plaintiff is entitled to terminate and recall the RM2m terms loan;

(b) Whether the second defendant, as the guarantor is liable for the debt of the first defendant (if any);

(c) Whether the bridging loan was unlawfully terminated;

(d) If the aforesaid bridging loan was unlawfully terminated, whether the

defendants have suffered any loss or damage by virtue of the termination of the bridging loan of RM18.5m as alleged in the counterclaim.

[14] With the above questions at the forefront of his mind the learned trial judge came to his finding at the end of the trial as follows:

> At the conclusion of the trial, I found that the plaintiff failed to prove its case against the defendant on the balance of probabilities and accordingly dismissed the action. As for the counterclaim, I allowed the claim and directed for early assessment of damages by the deputy registrar.
>
> The starting point in considering the issues before the court has to be the document at ABD 98-99, which is a letter written by the plaintiff to the first defendant informing the first defendant of their agreement to vary the 'pricing' and 'repayment' of fixed loan in the following terms:
>
> *Pricing:* 1.5%pa above Base lending rate (currently at 12.30 %pa) subject to fluctuation at the bank's discretion without prior notice to you. Interest is to be calculated on daily rest basis.
>
> *Repayment:* By way of 60 equal monthly instalments of RM46,329.40 (inclusive of interest) commencing April 2001 until full settlement or at an earlier date to be determined at the sole discretion of the bank. Instalment repayments shall commence on the first day of the following month if the loan is fully released on or before 15 of the month. If the loan is fully released on or after 16 of the month, the first instalment date will be the first day of the second month following the full release date. Meanwhile, interest is to be serviced monthly.

[15] The appellant's appeal against the above decision of the trial judge substantially is based on the premise that the judge in coming to the above decision had directed his mind solely on one single document ie the record variation letter dated 2 July 1998 when in fact the said document should have been read together with many other contemporaneous documents comprising of the letter of offer dated 3 July 1996, the banking facilities agreement (the principal contractual document) and various correspondence between the appellant and the first respondent. It is submitted that the second variation letter is the culmination of a series of bargains and negotiations by the first respondent with the appellant through the said correspondence. In the light of that it is submitted it was wrong for the trial judge to take the content of the second variation letter in isolation, ignoring other terms and conditions that are stated and found in various other documents.

[16] It is further submitted for the appellant that the learned trial judge in coming to his decision had failed to consider the evidence of surrounding circumstances and factual background that led to the issuance of the second variation letter by the appellant.

[17] For the respondent, it is submitted that other than the second variation letter dated 2 July 1998 which undoubtedly formed the basis of the trial judge's decision, the other documents preceding it were of no relevance and had no bearing to the appellant's claim; and thus 'had no impact on the reasoning by the learned trial judge'.

[18] Having stated the circumstances and the factual matrix of the case, we now proceed to consider the issues posed before the trial judge and at the same time for our determination in this appeal. As we have earlier mentioned in approach taken by the learned trial judge in looking for the answers to the question and was by directing and focusing his mind only to the contents of the appellant's letter to the first respondent dated 2 July 1998 giving no attention at all to other documents preceding the said letter. With respect we seriously doubt the wisdom of this approach. We are unable to comprehend the reasons of the learned trial judge in not taking into consideration and totally ignoring the contents of the preceding documents. For clarity we produce here below the 2 July 1998 letter.

SABAH BANK BERHAD (45733-D)

(Incorporated in Malaysia - head Office- Kota Kinabalu)

H005/009.1401/98

July 2, 1998

MASTER PERKASA (M) SDN. BHD.

Letter Box 1, 8th Floor, MUI Plaza Jalan

P. Ramlee 50250 Kuala Lumpur

Attn: Mr Lim Kien Ann

Dear Sir,

MASTER PERKASA (M) SDN. BHD.

Further to our letters dated 16/3/1998 and 9/4/1998 under ref: H005/009.1401(20)/98 and H005/009.1401 and your letter dated 18/5/1998, we are pleased to inform you that our Bank is agreeable to the variations as follows:

Pricing: 1.5% p.a. above Base Lending Rate (currently at 12.30% p.a.) subject to fluctuation at the Bank's discretion without prior notice to you. Interest is to be calculated on daily rest basis.

Repayment: By way of 60 equal monthly instalments of RM46,329.40 (inclusive of interest) commencing April 2001 until full settlement or at an earlier date to be determined at the sole discretion of the Bank. Instalment repayments shall commence on the first day of the following month if the loan is fully released on or before 15th of the month. If the loan in fully released on or after 16th of the month, the first instalment's due date will be the first day of the second month following the full release date. Meanwhile, interest is to be serviced monthly.

All other terms and conditions as stipulated in our earlier letter shall remain unchanged.

Notwithstanding the above, you will appreciate that the Bank reserves the right and discretion at any time to amend, vary, alter or to impose additional terms and conditions which we deem necessary without having to assign any reasons whatsoever.

We trust the aforesaid terms and conditions for the above facility are acceptable to you. Kindly indicate your acceptance by signing and returning to us the duplicate copy of this letter within 14 days from the date hereof, failing which the Bank shall reserve the right to treat this offer as lapsed and cancelled. Should you have any query, please do not hesitate to contact is at any time.

We are pleased to be of service to you.

Yours faithfully

for SABAH BANK BERHAD

Head Office

..... sgd.....

GOH CHENG BEE

Acting chief Executive Officer

c.c. Manager, KAR

We, Master Perkara (M) Sdn. Bhd., accept/do not accept the variations to this offer of FL RM2,000,000.00 based on the Terms and Conditions outlined above.

Signed by	:	..... sgd..... Authorised signatories	..... sgd..... Authorised signatories
	:	LIM CHEE KIONG Name (s)	CHAN KOK CHIN Name (s)
I/C No.	:	560203-08-5143	680427-10-5031
Date	:		

[19] On a cursory reading of the above letter, apart from the variations in respect of interest rate and the commencement date of the instalment payments, three other pertinent points caught our attention. Firstly, the first paragraph of the said letter made reference to the bank's letters dated 16 March 1998 and 9 April 1998 and also to the first respondent's letter of 18 May 1998.

[20] Secondly, under the 'repayment' clause the writer of the letter had also impressed on the need for the interest to be serviced monthly by the first respondent.

[21] Lastly, the writer of the letter reiterated that 'all other terms and conditions as stipulated in our earlier letters shall remain unchanged'.

[22] In view of the above we reiterate that we are unable to fathom the mind of the learned trial judge in discarding the rest of the terms and conditions contained in the bank facilities agreement and subsequent correspondence that led to the issuance of the 2 July 1998 letter when the same clearly stated that the variations therein were subject to all other terms and conditions found in those documents, and in the meanwhile, the first respondent was to service the interest monthly.

[23] In *Glamour Green Sdn Bhd v Ambank Bhd & Ors & Another Appeal* [2007] 3 CLJ 413, Gopal Sri Ram JCA (as he then was), in delivering the judgment of the court, had these to say:

> It is a settled guiding principle that where in a transaction more than one document or instrument is involved, court usually construes those documents together. The point was made by Raja Azlan J in *Mohamed Isa & Ors v Abdul Karim & Ors* [1970] 2 MLJ 165 in a language that cannot be rivalled. This is what Raja Azlan J (as His Royal Highness then was) said:
>
> It is a settled rule of construction that where several documents forming part of one transaction are executed contemporaneously all the documents must be read together as if they are one.

[24] Taking cue from the above passage, and with the factual matrix of the instant case in the background, it is obvious that the 2 July 1998 letter is not a stand alone agreement. Inevitably, it has to be read together with other documents preceding it. Only then would the court be able to determine and ascertain the intentions of the parties. This is fortified by a significant clause in the 2 July 1998 letter that states that all other terms and conditions stipulated in the appellant's earlier letters shall remain unchanged. This expression is also to be found in the appellant's earlier letter of 9 April 1998 to the first respondent.

[25] In the circumstances, it is, with respect, wrong for anyone to suggest that the variations contained in the 2 July 1998 letter had the effect of demolishing all other terms and conditions found in the earlier instrument and correspondences.

[26] The terms and conditions found in the second July 1998 letter read together with the banking facilities agreement and the subsequent correspondences between the parties clearly show that the appellant had only agreed at the request of the first respondent to convert the RM2m bank

guarantee which had been called upon into a fixed loan payable within 60 months starting from April 2001. It is to be noted that whilst the appellant agreed to give the aforementioned indulgence to the first respondent, the appellant in the same clause clearly impressed upon the first respondent to service the interest monthly in the meanwhile. The first respondent had unconditionally accepted these varied terms and conditions by signing the said letter.

[27] For the above reasons, the answers to the issues posed ie issue No i, ii, v must necessarily be in the affirmative. With regard to issue iv the answer is in the negative.

[28] As for the question whether the second respondent as the guarantor is liable for the debt of the first respondent, we answer that in the affirmative too. The 2 July 1998 letter did not in any way affect the rights and liabilities of the parties under the said personal guarantee by the guarantor who is also the director of the first respondent. Our view in this regard is fortified by cl 9 which states:

> 9 The surety's obligation hereunder shall not be discharged or released from this guarantee by any variation or alteration made after their guarantee to the terms of the contract between the bank and the customer or by any release or composition of promises to give time or any other indulgence being given to the customer or any other person or persons by the bank or by any act or omission on the part of the bank notwithstanding the provisions of sections 87, 88 and 92 of the Contracts Act.

[29] On the issue as whether the bridging loan was unlawfully terminated, in our judgment, the answer is 'No'. Section 11.01(2) of the banking facilities agreement provides that when notified, the first respondent must pay the appellant the full amount which the appellant had paid to JCSB under the bank guarantee. It is not in dispute that under the BFA the first respondent was liable as the principal debtor. This has led to the first respondent entering into a negotiation with the appellant for the restructuring of the loan which resulted in the first respondent now being given five years to settle the RM2m. Even with the new terms the first respondent had apparently failed to meet its obligation. In the circumstances, we are of the view that the appellant had every good reason in not wanting to proceed with the agreement and thus terminating the bridging finance.

[30] The first respondent had clearly demonstrated its inability to carry out its side of the bargain under the BFA. We are further of the view that if at all there was any loss to be suffered by the first respondent resulting from this failed transaction, the appellant was not to be blamed.

[31] For the above reasons, we are of the view that the learned trial judge was wrong in dismissing the appellant's claim and hence we allowed the appeal with costs.

Appeal allowed with costs.

Reported by Ashok Kumar